

STATE OF MICHIGAN
COURT OF APPEALS

WELK W. WALDRON,

Plaintiff-Appellant,

v

MICHAEL D. CLARK, d/b/a SEARS RETAIL
STORE,

Defendant/Counter Plaintiff-
Appellee,

and

DAVID L. HANSON, d/b/a A-1 APPLIANCE &
REPAIR,

Defendant.

UNPUBLISHED

June 24, 2003

No. 239193

Montcalm Circuit Court

LC No. 01-000080-NO

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

I. FACTS

Plaintiff purchased an air conditioner from Sears that included a delivery and installation package. Plaintiff is disabled, and he told Sears' employees that he could not assist in the installation. Since the unit was heavy and had to be installed high on a wall, plaintiff informed the salespeople that two people would be needed for the installation. A salesperson told plaintiff that he thought two people would deliver the unit.

Sears contracted with David Hanson to deliver and install the air conditioner. Hanson called plaintiff to set up the delivery and said that he would need assistance in installing the unit. Plaintiff stated that he informed Hanson of his disability, but he did not refuse to help. Plaintiff fell and injured his hip while getting the air conditioner out of the truck.

Plaintiff filed a three-count complaint against defendant Clark, the operator of the Sears store, alleging breach of contract, breach of warranty and negligence. Plaintiff alleged that defendant contracted and warranted the delivery and installation of the air conditioner without his help and it was negligent in failing to provide the required delivery assistance. Defendant moved for summary disposition, asserting that any injury was the result of actions of Hanson, who was an independent contractor for whom defendant was not liable. The trial court granted the motion and plaintiff now appeals.

II. STANDARD OF REVIEW

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

III. ANALYSIS

Plaintiff argues that liability is based on defendant's breach of its contract with plaintiff, not on the contractor's negligence and that the specific dealings with defendant created a duty of care to plaintiff. We disagree.

As a general rule, an employer of an independent contractor is not liable for the contractor's negligence. *Reeves v K-Mart Corp*, 229 Mich App 466, 471; 582 NW2d 841 (1998). A party may be liable for the negligence of a contractor where the party retains and exercises control over the contractor or where the work is inherently dangerous. *Id.* Neither exception is applicable to this case.

Defendant could not be held liable for the independent contractor's negligence, nor could he be held liable for negligence in selecting the contractor. *Id.* The alleged breach of duty was not the failure to perform the contract, but negligence in performing the contract. *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967). There was no breach of contract in this case. Plaintiff's air conditioner was delivered and installed. Plaintiff could have refused to assist in the installation and defendant would have been required to complete the installation. When asked by the contractor, plaintiff willingly assisted in the process. Defendant did not retain control of the process. It did not tell the contractor how to install the air conditioner and what means he should use.

Plaintiff told salespeople that he could not assist in the installation of the air conditioner. He had the same opportunity to tell the contractor that he could not assist, yet he decided to do so. As the trial court found, the contractor had no duty to ascertain the extent of plaintiff's abilities. Neither did defendant have a duty to protect plaintiff from himself. The trial court properly granted summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette